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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 349

MARION J. BERGUIDO, individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, III, by their Guardian, MARION J. BERGUIDO,

Petitioners,

vs.

EASTERN AIRLINES, INCORPORATED,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES AND OTHER AUTHORITIES CITED:

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Counter-Statement of Question Presented

Should the Supreme Court grant a writ of certiorari to review a decision by the Court of Appeals for the Third Circuit that a judge in the District Court for the Eastern District of Pennsylvania improperly admitted into evidence certain prejudicial hearsay testimony?

I

Counter-Statement of the Case

The petitioner, the plaintiff and appellee below, requests a writ of certiorari for Supreme Court review of a decision by the Court of Appeals for the Third Circuit reversing a judgment on a verdict in her favor in a wrongful death action in the District Court for the Eastern District of Pennsylvania. The reversal was on the ground that the trial judge had improperly admitted into evidence prejudicial hearsay testimony. The petitioner urges that the Court of Appeals erred and thereby generated momentous legal questions which the Supreme Court should resolve. The respondent contends that no basis whatsoever exists for the issuance of the writ of certiorari, for not only was the Court of Appeals decision clearly correct, but moreover, since it involved only a routine question of hearsay evidence, it does not embrace an issue warranting or deserving of the attention of the Supreme Court. *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955).[2]

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[1] Throughout this brief, references to the record will be as follows:

Pages in the petition for writ of certiorari itself will be designated by page number—(page ..).

Pages in the appendix to the petition for writ of certiorari will be designated by the number of the page and the letter "c"—(..c).

Pages in the appendix filed by respondent with the Court of Appeals will be designated by the number of the page and the letter "a"—(..a).

[2] In the above case, the Court cited with approval *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387 (1923), and quoted (349 U. S. 79) the following pertinent passage therefrom (261 U. S. 393):

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have

(Continued on following page)

In urging that the Court of Appeals (per Judges Biggs, McLaughlin and Sherman) erred, petitioner argues that, far from there being a simple matter of hearsay evidence involved, the appellate determination jeopardizes vast areas of the Federal system of jurisprudence. Consonant with this gloomy—and unfounded—forecast, petitioner, with an obvious bow to pronouncements on what will excite the attention of the Supreme Court, artificially formulates two reasons why a writ of certiorari should issue: first, that the Court of Appeals arbitrarily and without justification usurped the function of trial judge and jury, and second, that its decision has precipitated conflict between the circuits in the interpretation of Federal legislation.

Respondent will show that the first reason advanced, even if (as contended by petitioner) it were worthy of review by the Supreme Court, is founded upon wanton distortions of the record, proceeds from specious argument, and merits no consideration in the face of the carefully considered opinion of the Court of Appeals which petitioner has so recklessly assailed.

(Continued from preceding page)

enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

On petition for rehearing below, Chief Judge Biggs and Judges McLaughlin, Staley and Smith (Judges Kalodner and Hastie dissenting) stated in a *per curiam* opinion (10a):

"Upon careful reconsideration of the record and the petition for rehearing we adhere to our original view."

Judge Kalodner's dissent (in which Judge Hastie did not join) was apparently induced by the petitioner's manner of presenting the record. In this connection, see footnote 5, *infra*.

The second reason proposed by petitioner as justifying certiorari, that relating to inter-circuit conflict on legislative interpretation, is an even weaker reed for petitioner to lean upon under the circumstances of this case, for, as respondent will show, it is a clearly synthetic issue, completely extraneous to the case, and nothing which has occurred in this case to date has created any conflict between circuits in the interpretation of Federal legislation.

Only a brief analysis is required to demonstrate the poverty of petitioner's position. The few additional facts necessary to understand the issue are set forth in the argument below.

II

ARGUMENT

The Petition is Without Merit

Suit arose out of an airplane accident, allegedly due to pilot error. All seventeen persons on board, including the crew and the petitioner's decedent, were killed and the airplane was largely destroyed by fire and impact. The trial judge held that petitioner's wrongful death action was governed by the Warsaw Convention (49 Stat. 3000). To exceed the amount of the recovery provided by Article 22(1) of said Convention, petitioner sought to prove "wilful misconduct" on the part of respondent's pilots by producing at the trial two experts (Glickstein and Cann) who were permitted by the trial judge to supply opinion testimony on the state of mind of said pilots.

The Court of Appeals recognized that the aforesaid expert opinion, which was the predicate of the alleged "wilful misconduct," rested, in turn, solely and exclusively upon certain critical facts, or more accurately, figures, presented in hypothetical questions relating to the airplane's speed, rate and angle of descent, angle of bank and longitudinal attitude, stating (4c):

"These figures were the foundation upon which plaintiff's expert witnesses constructed their opinions as to whether or not the pilot intentionally flew below the glide slope and the authorized minimum."

It was these figures which the Court of Appeals held were improperly admitted into evidence and should have been excluded as hearsay.

The foregoing figures had come into evidence through the testimony of one Searle, an investigator of the Civil Aeronautics Board (hereinafter C.A.B.). However, these figures were not Searle's but rather had evolved from work done by one Carl Schmidt, an aeronautical engineer to whom this work had been specifically assigned. Schmidt was never called as a witness, and respondent was never able to test the validity of his computations because Searle was unable to state of his own knowledge what Schmidt did or how he did it, including of course, whether or not Schmidt made any assumptions.

Specifically, on cross-examination Searle testified (253a and 254a):

"Q. What I want to ask and what I want to get straightened out is: In your report, are these conclusion facts, 140 knots, descent, and so on, you said you did not determine these yourself.

Is that true you did not calculate them?

A. That is correct.

Q. Who calculated them?

A. Mr. Carl Schmidt.

Q. Then the results were given to you?

A. Right.

Q. Do you know, of your own knowledge, whether Mr. Schmidt made any assumption of any kind in determining—in coming to these conclusions you have here?

The Witness: No, sir.

Q. Do you know how Mr. Schmidt did this or what computations he used in arriving at these figures?

A. No, sir; I did not.'"[4]

Petitioner nevertheless argues that the Court of Appeals usurped the functions of trial judge and jury in determining that Searle's testimony about Schmidt's work was inadmissable hearsay, and contends that Searle "personally verified" Schmidt's calculations, basing that contention on an allegedly "fair inference" from selected dictionary definitions of the word "checked" (page 16). In so contending, petitioner flies in the face of Searle's candid and explicit testimony to the contrary. Respondent cannot comprehend how, in view of such unambiguous testimony on the point by Searle, not to mention the fact that Schmidt was technically trained as an aeronautical engineer, petitioner can argue that Searle either did or was in any position to have "personally verified" Schmidt's calculations. The record is unequivocally to the contrary.

An even more serious misrepresentation of the record may be found in petitioner's apparent contention that Searle testified that Schmidt made no assumptions in making his computations (page 17), a contention petitioner makes in urging that the Court of Appeals had weighed the credibility of Searle and La Vake and had rejected Searle's testimony in favor of La Vake's, thereby usurping the

[4] In light of the above testimony, it is readily apparent that when Searle introduced Schmidt's figures into evidence, without further knowledge about the subject upon which he could be cross-examined, a most elementary example of inadmissible hearsay arose for consideration by the Court of Appeals. Thus, as stated in 5 WIGMORE, EVIDENCE, §1362 (3d ed. 1940):

"It is here sufficient to note that the Hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination.*" (Emphasis by author.)

jury's function and depriving petitioner of a jury trial as guaranteed by the Seventh Amendment (pages 19 and 20). The record (as previously quoted on pages 5 and 6 in context and without the petitioner's ambiguous paraphrasing thereof) shows that Searle testified that he *did not know what* Schmidt did or *how* he did it, and that simply *one* of the things he did not know was whether Schmidt made any assumptions. Petitioner's tactic (page 17), in seeking to wrench support from this testimony, is obvious. It is to twist a negative answer—a disclaimer of knowledge—into authority for an affirmative proposition, and then to complain about the refusal of the Court of Appeals to accept the distortion.[*] Moreover, since Searle was silent on the point, it follows that La Vake could not have contradicted him, as petitioner suggests in the petition (pages 20 and 21).[*] The contradiction exists only in petitioner's argument, not in the record.

Respondent has not analyzed herein the authorities cited by the petitioner in part I of the petition because their applicability, quite obviously, depends on the validity of petitioner's factual premises. As shown above, the record conclusively rejects and invalidates those premises and the arguments based thereon, and the authorities, therefore, have no bearing on this case.

[*] Parenthetically, in view of the total absence of contradictory testimony in the record which could be contrasted and compared, petitioner's strategy on this point is to strongly suggest a contradiction (pages 19 and 20) and then to shift over to Judge KALODNER's dissent on the petition for rehearing to supply a direct statement that there was a contradiction (page 21). The record, as noted, is otherwise. In addition to revealing petitioner's devious approach, the argument on this point also illustrates that Judge KALODNER, unfortunately, who was not a member of the original panel, apparently was induced to misconceive what is in the record.

The argument in part II of the petition may be dispatched summarily: it is a transparent attempt to induce the Court to grant certiorari on the basis of alleged conflicts arising out of an irrelevant statute, the Federal Business Records Act (62 STAT. 945, 28 U. S. C. §1732 (1948)).

The gist of petitioner's argument appears to be that if oral C.A.B. testimony is not barred by 72 Stat. 781, 49 U. S. C. §1441(e) (1958),[6] it then becomes automatically admissible under the Business Records Act. This conclusion, as the Court of Appeals quickly noted (6e), is a *non sequitur*. The Court also observed (7e) that "the report itself was not in evidence nor was it suggested as a reason for the admission of the evidence." We might add, of course, that any attempt to introduce the report into evidence would have been precluded by 49 U. S. C. §1441(e). Moreover, accepting petitioner's argument would lead to the curious result of *oral testimony*, based on a record which is itself barred from evidence under a specific statute governing such *records*, being admitted under still another statute relating only to *records*, but without so much as a solitary record of any kind ever having been offered in evidence. The argument rejects itself. Without exhausting the chaotic possibilities inherent in petitioner's argument, we note in conclusion, as did the Court below (8e), that it would also circumvent 49 U. S. C. §1441(e). Petitioner, obviously well aware of the problems the argument would trigger with respect to both of the statutes under discus-

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[6] Entitled "Use of records and reports as evidence", and referring to the records and reports of the C.A.B., the text of 49 U.S.C. §1441(e) reads:

"No part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

sion, makes no attempt to reconcile them in light of the argument in part II of the petition.[7]

III

CONCLUSION

The petitioner, recognizing that the Supreme Court ordinarily will not grant a writ of certiorari merely to review questions of an evidentiary nature,[8] much less the particular one here involved, has disguised the simple hearsay question decided below in two lengthy but patently unsound arguments. The first is based upon specious arguments pieced together from blatant distortions of the record. The second is even more synthetic and contrived. The record, even on casual inspection, rejects the peti-

[7] While the cases cited in part II of the petition are as irrelevant as those cited in part I, taken as a whole they are a further illustration of the spurious nature of petitioner's argument. Without squandering the time and space which would be entailed in a case by case review, we rely on the succinct disposition by the Court below of *Mason* v. *Pittsburgh Des Moines Steel Co.*, 183 F. 2d 467 (3 Cir. 1950) and request the Court to observe that despite the mass of cases cited, only *one* concerned an airplane accident (*Pekelis* v. *Transcontinental & West Air*, 187 F. 2d 122 (2 Cir. 1951)), and it involved neither C.A.B. testimony nor a C.A.B. report. In short, the cases in part II cut in precisely the opposite direction from that intended by the petitioner.

[8] See for example, *General Pictures Corp.* v. *Electric Co.*, 304 U. S. 175, 178 (1938), noting on petition for certiorari that "Granting of the writ would not be warranted merely to review the evidence or draw inferences from it", *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 508, 509 (1924), dismissing a writ of certiorari as improvidently granted on mistaken impression that a question of public importance was involved rather than a mere question of fact arising out of petitioner's particular case, and *Houston Oil Co. of Texas* v. *Goodrich*, 245 U. S. 440, 441 (1917), stating that the Court does not review questions depending "essentially on an appreciation of the evidence."

tioner's attempt to transform a simple and clearly correct decision by the Court of Appeals into a complex case of land mark proportions.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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